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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/480,461	06/07/1995	GARY K. MICHELSON	P-12550-(DIV	9274
22882	7590	12/27/2005	EXAMINER	
MARTIN & FERRARO, LLP 1557 LAKE O'PINES STREET, NE HARTVILLE, OH 44632			BROWN, MICHAEL A	
			ART UNIT	PAPER NUMBER
			3764	
DATE MAILED: 12/27/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

08/480,461

Applicant(s)

MICHELSON, GARY K.

Examiner

Michael Brown

Art Unit

3764

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --****Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 05 October 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 90 and 95-241 is/are pending in the application.
- 4a) Of the above claim(s) 90 and 140 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 114, 115, 131, 138, 141-180 and 237-240 is/are allowed.
- 6) ☒ Claim(s) 95-103, 106, 108-113, 116-121, 124-127, 129-130, 132, 135-137, 138-139, 181-185, 188-193, 196-199, 201-203, 205-207, 209-213, 216-221, 224-234, 236 and 241 is/are rejected.
- 7) ☒ Claim(s) See Continuation Sheet is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 10/5/05 and 8/9/04
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

Continuation of Disposition of Claims: Claims objected to are  
104, 105, 107, 122, 123, 128, 133, 134, 186, 187, 194, 195, 200, 204, 208, 214, 215, 222, 223 and 235.

Copies of English language abstracts, Search Reports, or in some cases where available, more complete translations or U.S./U.K. related patents of the listed non-English documents (previously cited) are attached.

Please note that in the IDS submitted November 23, 1998, ES 283078 is related to U.S. Patent No. 4,877,020; JP 57-29348 is related to U.S. Patent No. 4,349,921; and JP 61-122859 is related to U.S. Patent No. 4,759,766, all of which were also submitted in the IDS dated November 23, 1998. Additionally, the applicant submits herewith the following U.S./U.K. related patents corresponding with the following non-English references:

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GB 1291470	relates to	DE 1961531
GB 1492990	relates to	DE 2446039
GB 1531487	relates to	FR 2295729
US 5,279,292	relates to	DE 4104359

Applicant respectfully requests that the Examiner consider the listed documents and indicate that they were considered by making appropriate notations on the attached form.

This submission does not represent that a search has been made or that no better art exists and does not constitute an admission that each or all of the listed documents are material or constitute "prior art." If the Examiner applies any of the documents as prior art against any claim in the application and applicant(s) determine(s) that the cited document(s) do not constitute "prior art" under United States law, applicant reserves the right to present to the office the relevant facts and law regarding the appropriate status of such documents.

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12-20-05

Claims 95-101, 108-113, 116-121, 124-127, 129-130, 132, 135-136, 139, 181-185, 188-193, 196-199, 201-203, 205-206, 209-213, 216-221, 224-233, 236 and 241 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Brantigan '915.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 137, 207 and 234 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brantigan '915 in view of Goble.

Brantigan '915 discloses in figures 1-11 an apparatus for use in human spinal surgery, substantially as claimed. However, Brantigan does not disclose a tap used to form an opening in the vertebrae. Goble teaches in figure 6 a tap 41. It would have been obvious to one having ordinary skill in the art at the time that the invention was made that the tap as taught by Goble could be substituted for the self tapping screw as disclosed by Brantigan because both devices are functionally equivalent with respect to forming a threaded opening in a vertebrae.

***Allowable Subject Matter***

Claims 104-105, 107, 122-123, 128, 133-134, 186-187, 194-195, 200, 204, 208, 214-215, 222-223 and 235 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 114, 115, 131, 138, 141-180 and 237-240 are allowed.

### ***Response to Arguments***

Applicant's arguments filed October 5, 2005 have been fully considered but they are not persuasive. Applicant argues that Jacobson doesn't disclose a spinal distractor. However, Jacobson is used to distract a portion of the spine. Thus, the examiner is interpreting the device as being a spinal distractor. Applicant argues that Jacobson doesn't disclose disc penetrating extensions having a portion adapted to bear against each adjacent endplate and having a length that is greater than the depth of the spinal disc. However, Jacobson clearly discloses a disc penetrating portion. Whether the length of the disc penetrating portion is of a length that is greater than the depth of the spinal disc was not given patentable weight because patient vary in size. Applicant argues that Brantigan doesn't disclose a disc penetrating portion adapted to bear against two end plates. However, Brantigan clearly discloses a disc penetrating portion. It appears to bear against adjacent vertebrae. Thus, making it capable of bearing against two endplates.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is 571-272-4972. The examiner can normally be reached on 5:30 am-4:00 pm Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gergory Huson can be reached on 571-272-4887. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



M. Brown  
December 22, 2005

MICHAEL A. BROWN  
PRIMARY EXAMINER